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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

THE CITY OF SEATTLE, et al., *Appellants*
and
THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY, THE HONORABLE W. R. COLE, JUDGE, *Appellant*
v.
ROBERT R. BEEZER, *Appellee*
and
PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON, *Intervenor-Appellee*

On Appeal From the Supreme Court of the State of Washington

JURISDICTIONAL STATEMENT

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PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON, *Intervenor-Appellee*

On Appeal From the Supreme Court of the State of Washington

JURISDICTIONAL STATEMENT

This appeal is from a final judgment of the Supreme Court of Washington issuing a writ of mandamus to a trial judge commanding the exercise of state court jurisdiction in a collateral attack on the final judgment of the Court of Appeals for the District of Columbia Circuit rendered in the direct review proceedings established by Congress for Federal Power Commission orders. Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Supreme Court of Washington filed on July 18, 1963 (162 Wash. Dec. 559), denial of a petition for rehearing thereof on October 7, 1963 reflected in the remittitur issued on the same date, and the peremptory writ of mandamus which also issued on October 7, 1963, are all reproduced in Appendix A hereto. The decision of the Court of Appeals for the District of Columbia Circuit is *Public Utility District No. 1 of Pend Oreille County* v. *FPC*, 308 F. 2d 318, *cert. denied*, 372 U.S. 908 (1963), *petition for rehearing denied*, 372 U.S. 956 (1963), *motion for leave to file second petition for rehearing denied*, 11 L. Ed. 2d 101 (October 14, 1963). A copy of the opinion of the Court of Appeals is attached hereto as Appendix B. Two earlier opinions by the Supreme Court of Washington in this cause reported at 60 Wn. 2d 239, 373 P. 2d 796 (1962) and 60 Wn. 2d 652, 375 P. 2d 256 (1962), are attached hereto as Appendixes C and D, respectively.

JURISDICTION

This suit was brought in the Washington Supreme Court under the "all writs" provision of the Washington State Constitution * for a writ of mandamus to compel a trial judge to take jurisdiction and proceed to the trial of a taxpayer's suit. The judgment of the Supreme Court of Washington issuing a writ of

* Article IV, Section 4 ". . . the supreme court shall also have power to issue writs of mandamus . . . and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction . . ." The Washington Code, in the chapter relating to the special proceedings of certiorari, mandamus and prohibition, provides: "A judgment in a special proceeding is the final determination of the rights of the parties therein . . ." (RCW § 7.16.020).

mandamus became final on October 7, 1963, simultaneously with a denial of rehearing (Appendix A-11-12, 14). Notice of this appeal was filed in that court on November 4, 1963. The jurisdiction of this Court to review this decision by direct appeal is conferred by 28 U.S.C. § 1257(2). The finality of the judgment below issuing the writ and the availability of review by appeal in this Court are sustained by *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.*, 240 U.S. 30 (1916); *Pacific Coast Dairy* v. *Department of Agriculture of California*, 318 U.S. 285 (1943); *Bandini Petroleum Co.* v. *Superior Court*, 284 U.S. 8 (1931); and *Detroit and Mackinac Railway Co.* v. *Michigan Railroad Comm'n.*, 240 U.S. 564 (1916); *cf. Pan American Petroleum Corp.* v. *Superior Court*, 366 U.S. 656 (1961) and *Madruga* v. *Superior Court*, 346 U.S. 556 (1954). Finality of the judgment is also sustained by *Mercantile National Bank* v. *Langdeau*, 371 U.S. 355 (1963), and *Local No. 438 Construction & General Laborers' Union* v. *Curry*, 371 U.S. 542 (1963). The appropriateness of appeal is further sustained by *Mercantile National Bank* v. *Langdeau, supra* and *Hendersonville Light & Power Co.* v. *Blue Ridge Interurban Railway Co.*, 243 U.S. 536 (1917).

QUESTIONS PRESENTED

The Federal Power Commission issued a license to a Washington municipality (Seattle) for the construction of a hydroelectric project on a navigable water of the United States, at the same time denying a license to a competing applicant, also a Washington municipality (Public Utility District No. 1 of Pend Oreille County). The Court of Appeals on direct review proceedings under the Federal Power Act brought by the unsuccessful PUD applicant, expressly

upheld the necessary premise of the issuance of the license by FPC that section 21 of the Act grants federal eminent domain powers to Seattle to condemn unimproved lands owned by the PUD essential for the licensed project, irrespective of a state law (RCW § 35.84.030) argued to bar their condemnation. This Court denied certiorari and twice denied rehearing. In these circumstances:

> 1. May the judgment of the Court of Appeals that the state statute cannot bar Seattle from condemning the PUD lands under section 21 of the Federal Power Act be collaterally attacked in the state courts in a taxpayer's suit in which the PUD has joined?

If not held foreclosed by the judgment of the Court of Appeals, the further issue is presented:

> 2. Can the federal eminent domain power granted under section 21 of the Federal Power Act to the City of Seattle as an FPC licensee be overridden by a Washington statute (RCW § 35.84.030) alleged to bar any Washington city from condemning lands held by a Washington Public Utility District even though the lands in question are essential to the construction of the project licensed to the City by FPC as best adapted to the comprehensive development of a navigable waterway of the United States?

STATUTES INVOLVED

The statutes involved are section 313(b) (16 U.S.C. § 825*l* (b)) and section 21 (16 U.S.C. § 814) of the Federal Power Act, and section 35.84.030 of the Revised Code of Washington, all of which are set forth verbatim in Appendix E hereto.

STATEMENT

In 1957, the City of Seattle, Washington, filed an application with the Federal Power Commission for a license to construct the $100 million Boundary hydroelectric project on the Pend Oreille River, a navigable tributary of the Columbia. Full public notice of this application was given as required by the Federal Power Act and FPC regulations.*

Public Utility District No. 1 of Pend Oreille County, Washington, (herein called PUD) intervened in opposition and filed a conflicting application for a project, known as the Z Canyon project, to be built at a site one mile upstream from the Boundary site. Protests to the Seattle application were also made by a number of groups and individuals. In its intervention the PUD objected to the issuance of any license to Seattle on the ground, among others, that Seattle was barred by state law (RCW 35.84.030) from taking certain unimproved lands adjacent to Pend Oreille River necessary for the Boundary project which had been purchased by the PUD for $20,100. The Federal Power Commission consolidated the applications for license and held extensive hearings on the comparative merits of the two projects. In orders of July 10, 1961 and September 6, 1961, the Commission granted a license to Seattle for the Boundary project and denied a license to the PUD for Z Canyon,

* See §§ 4(e) and (f) of the Federal Power Act (16 U.S.C. §§ 797(e), (f)) and §§ 1.36, 4.31 and 4.81 of FPC's Rules of Practice and Procedure, and Regulations. The notice of the Seattle application, issued by FPC on August 21, 1957, appeared in the Federal Register August 27, 1957 (Vol. 22, No. 166, p. 6903) and in local newspapers once each week for four weeks. Similar action was taken in connection with Seattle's application to FPC in 1953 for a preliminary permit for this project.

finding that Seattle's project, in the language of section 10(a) of the Federal Power Act, was:

> ". . . best adapted to a comprehensive plan for this development of the Pend Oreille River for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes." (26 FPC 54, 139-140 (1961).)

With respect to the issue raised by the PUD that RCW 35.84.030 barred Seattle from taking the PUD's lands necessary for the Boundary project, the Commission held:

> ". . . We need not decide in this proceeding whether Seattle is prohibited by state law from acquiring the particular properties of the PUD in question. In our opinion Seattle's right to acquire these properties by the exercise of the power of eminent domain under Section 21 of the Federal Power Act is well established. *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99; *City of Tacoma* v. *Taxpayers, supra; First Iowa Hydro-Electric Cooperative* v. *FPC*, 328 U.S. 152; *State of Washington Department of Game* v. *FPC*, 207 F 2d 391, cert. den. 347 U.S. 936. And as we found in order issuing license, Seattle has submitted satisfactory evidence of compliance with the requirements of all applicable state laws insofar as necessary to effect the purposes of the license." (26 F.P.C. 463, 466 (1961).)

The PUD appealed, pursuant to § 313(b) of the Federal Power Act, to the Court of Appeals for the District of Columbia Circuit, again urging that RCW 35.84.030 barred the exercise of section 21 eminent domain powers by Seattle. The Court of Appeals ex-

pressly rejected this contention. It held in a unanimous opinion, affirming the Commission:

> ". . . Strictly speaking, the question is not whether Seattle has complied or can comply with the state eminent domain statute, but rather whether the limiting provision of that statute prevents Seattle from exercising the right of condemnation conferred on it by Section 21 of the Federal Power Act. That is to say, once Seattle has become a federal licensee, does the prohibitory provision of the state condemnation statute disable it from going forward with its federally-licensed project by preventing it from condemning under Section 21 of the Federal Power Act the land necessary for its purposes?"
>
> * * * * * * * * *
>
> "What precedes makes it clear that the State statute here involved, even if according to its own terms it is applicable, cannot make it impossible for Seattle as a federal licensee to condemn under the federal statute. . . ." (308 F. 2d at 321-322, 323; Appendix B-6-7, 8.)

This Court denied the PUD's petition for certiorari, 372 U.S. 908 (1963), and two requests for rehearing 372 U.S. 956 (1963), 11 L. Ed. 2d 101 (October 14, 1963).

The suit in the Washington courts to which the mandamus action relates was begun on November 29, 1961, by Beezer as a representative taxpayer of the City of Seattle (R. 0001). He was joined therein the next day by the PUD as an intervening party plaintiff (R. 0016). This was shortly after the FPC's order issuing a license to Seattle and while the PUD was taking the direct review proceedings described above to the District of Columbia Circuit. The purported taxpayer's suit sought to litigate exactly the same issue which had

been decided by FPC and which was then pending before the Court of Appeals, namely whether RCW 35.84.030 could bar Seattle from acting under its license and section 21 of the Federal Power Act (16 U.S.C. § 814) to condemn the PUD's lands essential to the Boundary project. The specific relief sought by Beezer and the PUD from the state court was a declaration that the City could not act under its FPC license and an injunction against the City's spending any more money on Boundary project.

Seattle moved for summary judgment on the grounds that "the action constitutes an impermissible collateral attack on the orders of the Federal Power Commission" prohibited by section 313(b) of the Federal Power Act and "that the United States (through section 21 of the Federal Power Act) had preempted jurisdiction of the subject matter of the action." (R. 0031). Judge W. R. Cole, sitting as the Superior Court for King County, granted Seattle's motion for summary judgment as against both Beezer and the PUD on January 9, 1962, holding:

> "I feel that the First Iowa, the Tacoma v. Taxpayers, the State of Washington, Department of Game v. F.P.C., and the Tuscarora Indian Nation cases all hold in effect that state laws cannot prevent the F.P.C. from issuing a license or prevent the licensee from acting under the license under section 21 of the Federal Power Act and in effect, that under the Commerce Clause, the federal government has dominion, to the exclusion of the statutes, over navigable waters.
>
> "I think that this present action in effect is an impermissible collateral attack upon this order of the Federal Power Commission and that, by virtue of 313B of the Federal Power Act, the exclusive

jurisdiction to determine the issues in this matter are with the Circuit Court of Appeals.

"I think that Mr. Beezer actually is bound, as far as we are concerned here in this Court, by the action of the Federal Power Commission." (R. 0042).

The PUD and Beezer appealed to the Supreme Court of Washington. That court in a 6 to 3 opinion filed July 12, 1962 reversed, reaffirming its opinion in its second *Tacoma* case* "that the federal government may not confer powers upon local units of government created by the state beyond the capacity given them by their creator." (*Beezer* v. *Seattle*, 60 Wn. 2d 239, 373 P.2d 796 (1962); Appendix C.) However, the Washington Supreme Court also stated in the same opinion:

"Whether the Federal Power Commission can confer powers of condemnation on cities, which the state legislature has, as a matter of policy expressly prohibited, the federal courts must determine." (Appendix C-4.)

Following the D.C. Circuit's decision on August 30, 1962, Seattle moved the Washington Supreme Court to dismiss Beezer, then still pending before that court on rehearing, as already adjudicated and moot. The court, in a 6-3 opinion filed on October 2, 1962, denied Seattle's motion. It held:

"We are advised that Public Utility District No. 1 of Pend Oreille County will petition the Supreme Court of the United States to review, by

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* *City of Tacoma* v. *Taxpayers*, 49 Wn. 2d 781, 307 P. 2d 567 (1957), reversed by *City of Tacoma* v. *Taxpayers*, 357 U.S. 320 (1957). The several proceedings in the Washington Supreme Court in the Tacoma litigation are frequently referred to as the "Cowlitz cases," after the river involved there.

> certiorari, the circuit court's affirmance of the order of the Federal Power Commission; and, pending such review, we do not accept the conclusions of the circuit court as res judicata of the issues heretofore determined by this court in its opinion of [July 12,] [sic] 1962. *Nor do the conclusions of the circuit court render moot the issues presented to us for determination, unless, and until, the judgment of the circuit court becomes final and binding on Public Utility District No. 1 of Pend Oreille County, Washington.*" (*Beezer* v. *Seattle*, 60 Wn. 2d 652, 375 P. 2d 256 (1962); Appendix D-2.) (Emphasis supplied.)

The court thereupon denied rehearing and remanded the case to the Superior Court for trial of the factual question of whether the PUD's unimproved properties were part of its "electric light plant and system" within the scope of RCW 35.84.030.

Before the Superior Court proceeded with the trial, this Court, as noted above, denied certiorari to the District of Columbia Circuit in *Public Utility District No. 1* v. *FPC* (372 U.S. 908) and denied a petition for rehearing (372 U.S. 956).* Following these actions, Judge Cole again indicated that the case should be dismissed for want of jurisdiction, whereupon Beezer and the PUD sought a special writ of mandamus from the Washington Supreme Court, directed to Judge Cole to compel the trial (R. 0078). In this mandamus action,

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* This was in March, 1963, the same month in which Seattle commenced condemnation proceedings under section 21 of the Federal Power Act in the U.S. District Court for the Eastern District of Washington. The case has still not been assigned a trial date. The PUD has raised RCW 35.84.030 as a bar in that case also, and the issue will doubtless persist, unless set at rest by this Court now, through whatever subsequent proceedings are had.

the Washington Supreme Court rendered a 5-4 decision adverse to Seattle on July 18, 1963, stating:

> "We understand the reluctance of the Superior Court of King County to proceed, as we have directed, because of an intervening decision of the United States Court of Appeals for the District of Columbia in *Public Util. Dist. No. 1 of Pend Oreille County* v. *Federal Power Comm.* (August 30, 1962) 308 F. (2d) 318, cert. denied, 372 U.S. 908 (1963), 9 L.Ed. (2d) 716, 83 S. Ct. 719, petition for rehearing denied, 372 U.S. 956, 9 L.Ed. (2d) 980, 83 S. Ct. 950. This reluctance is doubtless strengthened by the concessions of counsel in their briefs in a recent motion to dismiss an appeal, and our own statements in the opinion denying the motion to dismiss (*Beezer* v. *Seattle* (Oct. 2, 1962), 60 Wn. (2d) 652, 375 P. (2d) 256). [Appendix C herein]
>
> "The city of Seattle insists, and the King County Superior Court is apparently inclined to agree, that the United States Court of Appeals decision has rendered moot, and is res judicata of, the litigation now pending in that court."

Nevertheless, the court held:

> ". . . we are unwilling, absent a decision by the United States Supreme Court, to accept the opinion of the United States Court of Appeals as decisive of those [Section 21 and RCW 35.84.030] issues."
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> * * * * * * * * *
>
> "The refusal of the Supreme Court of the United States to review by certiorari the decision of the Court of Appeals for the District of Columbia adds nothing to that decision as it is not an expression by the Supreme Court of an opinion on the merits . . ." (Appendix A-3, 5.)

The four dissenting Justices of the Washington Supreme Court believed that the state courts lacked further jurisdiction:

> "That judgment [of the Court of Appeals pursuant to section 313(b) of the Federal Power Act] is now final and binding on the P.U.D., and the original issues before us have become moot, but the majority refuses to accept the decision of the only court that has jurisdiction to decide these issues unless and until the United States Supreme Court reviews that decision. Since that court has refused to review the decision of the court of appeals, I see no escape from the conclusion that the litigation is now ended." (Appendix A-10.)

On October 7, 1963, the majority of the Washington Supreme Court denied the City's petition for rehearing, declared its July 18, 1963 decision final, and issued a "Peremptory Writ of Mandamus." That writ provided that the King County Superior Court "has full and complete jurisdiction" and directed that court "to proceed with the trial of said cause." (Appendix A-14-15.) When the Washington Supreme Court announced its action on October 7 the City was already constructing the project, obedient to the FPC orders issuing license. The record of the City-PUD case before FPC showed that even with Boundary's 540,000 kilowatts on the line by 1967 the City would still be short of all of the power required to serve its needs (26 FPC 54, 95). In order to have any hope of meeting this deadline, it was necessary for the City to proceed with construction as quickly as possible. Many construction contracts involving access, clearing and other work for the Boundary site are finished or in process at a cost of about $6,000,000, and notices to proceed have necessarily been given on contracts cov-

ering turbines, generators and other equipment totalling over $13,000,000.

If the federal review proceedings under section 313 (b) are not final but remain subject to collateral attack in the state courts, then the public officials of the City of Seattle have no assurance that their further expenditure of public moneys for the construction of the Boundary project would be legally justified. Furthermore, the issuance of bonds, which will soon be necessary to finance the construction contracts will be rendered impossible with the *Beezer* litigation still pending. In an effort to put these questions at rest and to permit the project to move forward, Seattle filed notice of appeal to this Court on November 4, 1963 (R. 0117) pursuant to 28 U.S.C. § 2101(c) and Rules 10 and 11 of the Rules of this Court.

An application by Seattle to the Washington Supreme Court for a stay of its mandate pending action by this Court was denied on November 8, and a similar application by Seattle to Mr. Justice Douglas as Circuit Justice for the Ninth Circuit was denied on November 9, 1963. Trial commenced in the Superior Court on November 12. The matter is at this writing pending before that court with proposed findings to be filed and argument to be had next month.

THE QUESTIONS ARE SUBSTANTIAL

The judgment by the Supreme Court of Washington (1) that the federal proceedings wherein the license for the Boundary project was issued to Seattle are subject to collateral attack in the state courts, and (2) that a state statute, RCW 35.84.030, invalidates section 21 of the Federal Power Act, would, if novel propositions of law, pose serious questions warranting full briefs, oral argument and detailed consideration

by this Court. This is not necessary, however, because both of these matters, as hereinafter discussed, have been authoritatively decided. Accordingly, the judgment of the Washington Supreme Court should be summarily reversed.

1. The decision by a narrow majority of the Washington Supreme Court permitting a relitigation in the state courts of a federal issue decided in the federal proceedings on issuance of the license to Seattle, directly conflicts with the decision of this Court in *Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958).

In the *Tacoma* case, the City of Tacoma held a Federal Power Commission license to construct a hydroelectric project on a navigable stream (the Cowlitz River). The license had been confirmed by the Ninth Circuit Court of Appeals on direct review brought by the State of Washington and this Court had denied certiorari, 347 U.S. 936 (1954). Subsequently, taxpayers of the City of Tacoma and the State of Washington sought to challenge in the state courts the power of the City, under its Federal license, to take state owned lands (a fish hatchery) necessary for the project. The Washington Supreme Court in what is known as its second Tacoma (or Cowlitz) decision held that the City could not take the state lands under section 21 of the Federal Power Act in the absence of state legislation granting it such power and capacity.*

This Court, on review of the Washington Supreme Court's judgment, stated the issue before it as follows:

> "We come now to the core of the controversy between the parties, namely, whether the license issued by the Federal Power Act to the City of

* See footnote, p. 9, *supra*.

> Tacoma give it capacity to act under that Federal license in constructing the project and delegated to it federal eminent domain power to take, upon the payment of just compensation, the state's fish hatchery—essential to the construction of the project—in the absence of state legislation specifically conferring such authority." (357 U.S. at 333.)

This Court held that this issue, which is indistinguishable from the issue presented in the *Beezer* litigation, either was or should have been litigated in the federal proceeding on issuance of the license:

> "This statute [§ 313(b)] is written in simple words of plain meaning and leaves no room to doubt the congressional purpose and intent. It can hardly be doubted that Congress, acting within its constitutional powers, may prescribe the procedures and conditions under which, and the courts in which, judicial review of administrative orders may be had. . . . So acting, Congress in § 313(b) prescribed the specific, complete and exclusive mode for judicial review of the Commission's orders. . . . It thereby necessarily precluded de novo litigation between the parties of all issues inhering in the controversy, and all other modes of judicial review. Hence, upon judicial review of the Commission's order, all objections to the order, to the license it directs to be issued, and to the legal competence of the licensee to execute its terms, must be made in the Court of Appeals or not at all. For Congress, acting within its powers, has declared that the Court of Appeals shall have exclusive jurisdiction to review such orders, and that its judgment 'shall be final,' subject to review by this court upon certiorari or certification. *Such statutory finality need not be labeled res judicata, estoppel, collateral estoppel, waiver or the like either by Congress or the courts.*" (357 U.S. at 336-337.) (Emphasis supplied.)

Further, under *Tacoma,* Mr. Beezer is bound by the federal proceedings already had in this case. While the State of Washington, unlike in *Tacoma,* expressed no interest in the Seattle licensing proceeding, it as well as Beezer had notice of the license application and is bound by the outcome of these proceedings. *Harris* v. *Central Nebraska Public Power and Irrigation Dist.,* 29 F. Supp. 425 (D.C. Neb. 1938). As this Court concluded in *Tacoma:*

> "[T]he judgment of the Court of Appeals, upon this Court's denial of the State's petition for certiorari, became final under § 313(b) of the Act, and is binding upon the State of Washington, its Directors of Fisheries and of Game, and its citizens, including the taxpayers of Tacoma; and that the objections and claims to the contrary asserted in the cross-complaints of the State, its Directors of Fisheries and of Game, and the Taxpayers of Tacoma, in this bond validation suit, were impermissible collateral attacks upon, and de novo litigation between the same parties of issues determined by, the final judgment of the Court of Appeals." (357 U.S. at 341.)

Tacoma is thus a direct, controlling precedent for barring the state court proceedings below in Beezer.* The direct federal review proceedings on the issuance of a license to Seattle became final upon this Court's denial of certiorari of the judgment of the Court of Appeals of the District of Columbia Circuit. The state

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* This was fully recognized by the Washington Supreme Court in its third *Tacoma* decision, in which it construed this Court's *Tacoma* decision (357 U.S. 320) as holding ". . . that attacks on the right of the City of Tacoma to proceed with the construction of these dams [under its FPC license] were 'impermissible collateral attacks upon' the final judgment of the United States Court of Appeals." 60 Wn. 2d 66, 71, 371 P. 2d 938, 941 (1962).

court proceedings then pending below became moot, whether labelled or unlabelled as res judicata, estoppel, waiver or collateral attack. As such they should be summarily dismissed.*

We turn now to the supersedure question which is reached only if this Court's *Tacoma* decision does not bar further proceedings below.

2. The decision of the Washington Supreme Court that RCW 35.84.030 bars Seattle from exercising its federal eminent domain powers under section 21 of the Federal Power Act to take the PUD lands necessary for the licensed Boundary project, not only directly conflicts with the express holding to the contrary by the Court of Appeals for the District of Columbia Circuit, but is contrary to long established principles set forth by this Court.

The question whether RCW 35.84.030 would take precedence over section 21 was expressly put to the Court of Appeals for the District of Columbia Circuit by the PUD on the direct review proceedings of the Federal Power Commission's order granting a license to Seattle for the Boundary project. After noting the direct conflict between the state and federal statute (308 F. 2d at 321-322, Appendix B-6-7, see p. 7, *supra*),

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* Summary action is warranted and desired. This dispute between the City and the PUD is entering its second decade, having started when the City filed application in 1953 with FPC for a preliminary permit. The PUD intervened urging RCW 35.84.030 as a bar to Seattle. (See dissenting opinion of Judge Donworth in *Beezer v. Seattle*, 60 Wn. 2d 239 (Appendix C)). The dispute is thus rivalling the protracted series of suits noted by this Court in *Tacoma* (357 U.S. at 322), and is certain to continue as a consequence of the Washington Supreme Court's mandate unless there is a summary reversal.

the Court of Appeals in a unanimous opinion by Chief Judge Miller, joined by Judges Bazelon and Bastian held:

> "... What precedes makes it clear that the State statute here involved, even if according to its own terms it is applicable, cannot make it impossible for Seattle as a federal licensee to condemn under the federal statute. . . ." (308 F. 2d at 323, Appendix B-8.)

The Washington Supreme Court below, while recognizing the holding of the Court of Appeals,* refused to follow it:

> "The issues involved in that litigation [Beezer v. Seattle] are of such importance and we are so completely convinced that we are right in the position taken in our opinion in *Beezer* v. *Seattle* (Public Util. Dist. No. 1 of Pend Oreille County, Intervenor, July 1, 1962, 60 Wn. 2d 239, 373 P. (2d) 796), that we are unwilling, absent a decision by the United States Supreme Court, to accept the opinion of the United States Court of Appeals as decisive of those particular issues." (Opinion of July 18, 1963, Appendix A-3.)

However, the Court of Appeals decision was not unprecedented. It was based on long established principles enunciated by this Court.

The first decision relied upon by the Court of Appeals was *State of Washington Department of Game*

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* "The opinion of the Court of Appeals for the District of Columbia, to which we have been referring, *after holding that Seattle has the right to condemn any property of the P.U.D. despite our statutory prohibition. . . .*" (Opinion of July 18, 1963, Appendix A-6-7; emphasis supplied.)

v. *Federal Power Comm'n.*, 207 F. 2d 391 (9th Cir. 1953), *cert. denied* 347 U.S. 936 (1954), which held that certain statutes of the State of Washington requiring a permit for the diversion of water, approval of the State Directors of Fish and Game and limiting the height of dams within the State to 25 feet, were void as conflicting with the Federal Power Act. The Ninth Circuit in turn relied on this Court's decision in *First Iowa Hydroelectric Coop* v. *Federal Power Comm'n.*, 328 U.S. 152 (1946), and held as follows:

> "The objectors further contend that Tacoma, as a creature of the State of Washington, cannot act in opposition to the policy of the State or in derogation of its laws.
>
> "Again, we turn to the First Iowa Case, supra. There, too, the applicant for a federal license was a creature of the state and the chief opposition came from the state itself. Yet, the Supreme Court permitted the applicant to act inconsistently with the declared policy of its creator, and to prevail in obtaining a license.
>
> "Consistent with the First Iowa case, supra, we conclude that the state laws cannot prevent the Federal Power Commission from issuing a license or bar the license from acting under the license to build a dam on a navigable stream since the stream is under the dominion of the United States." (207 F. 2d at 396)

As noted by the District of Columbia Circuit, this Court in *Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958) construed, without disavowal, the holding of the Ninth Circuit in the *State of Washington Department of Game* case as upholding the right of the City of Tacoma to exercise federal eminent domain

powers under section 21 to take a State owned fish hatchery as against a contention that it lacked such power and capacity under Washington law. The D. C. Circuit quoted *Tacoma* as follows:

> "'But the respondents say that the Court of Appeals did not decide the question of legal capacity of the City to act under the license and, therefore, its decision is not final on that question, but left it open to further litigation. They rely upon the following language of the opinion:
>
> * * * * * * * * *
>
> "'We believe that respondents' construction of this language is in error. The questioned language expressly refers to possible 'indebtedness limitations' in the City's Charter and 'questions of this nature, '*not to the right of the City to receive and perform, as licensee of the Federal Government under the Federal Power Act, the federal rights determined by the Commission and delegated to the City as specified in the license . . .*' (Emphasis added.)" (308 F. 2d at 322-323, citing 357 U.S. at 339-40.)

The conviction by the majority of the Washington Supreme Court below that "we are right" in this matter thus runs counter to well established federal law dating back to this Court's decision in *First Iowa* upon which the Ninth Circuit (confirmed by this Court in *Tacoma*) and the District of Columbia Circuit have held that federal eminent domain powers granted by section 21 are available to municipal licensees to effectuate the comprehensive development of the nation's navigable waters in the construction of projects approved by the Commission, as against a veto power in

the state.* No useful purpose would be served by this Court going over this well settled ground again. Accordingly, appellants urge that the judgment below be summarily reversed.

Respectfully submitted,

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December 16, 1963

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* If the state statute governed and were construed as the PUD would have it, it would veto any development of the Pend Oreille River. Seattle had acquired substantial property in the Boundary project area even by the time of the FPC hearing. Under a Washington law relating to city utility systems (RCW § 54.16.020), similar to the provision relating to PUD properties which the PUD says is controlling (RCW § 35.84.030), PUD's may not condemn electric properties of cities. Thus, under the PUD's contention in *Beezer*, even if it were to get a license from FPC, the PUD would not be able to construct a project. Similarly, under Washington law, investor owned power companies may not condemn municipally owned utility properties. The result would be a complete stalemate, and the purpose of the Federal Power Act as declared by this Court in *First Iowa Hydro-Elec. Coop.* v. *FPC* ". . . to make progress with the long idle water power resources of the nation. . . ." (328 U.S. 152, 171 (1945)), would be nullified.

APPENDIX A

Opinion of the Supreme Court of Washington of July 18, 1963 (160 Wash. Dec. 559); Order Denying Rehearing, Remittitur and Peremptory Writ of Mandamus Issued October 7, 1963

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 37037
EN BANC

ROBERT R. BEEZER, *Plaintiff and Relator,*

v.

THE CITY OF SEATTLE, ET AL., *Defendant and Respondent,*

PUBLIC UTILITY DISTRICT NO. 1 of PEND OREILLE COUNTY, WASHINGTON, *Intervenor and Relator,*

THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY, THE HONORABLE W. R. COLE, JUDGE, *Respondent.*

This is an application by the plaintiff, Robert R. Beezer, for a writ of mandamus to compel the Superior Court of King County to proceed as heretofore directed by this court:

> "We, therefore, set aside the summary judgment of dismissal, and direct the trial court to proceed with the determination of whether the property of the P.U.D., which the city of Seattle now takes the position it must condemn, is an 'electric power and light plant or electric system, or any part thereof.' If it is not, the action should be dismissed and the city left free to proceed to exercise its power of condemnation. If it is, we do not presume to suggest to the trial court what its action should be, because, as we have indicated, the city may find that if it has no power of condemnation, it may still be possible to acquire the

> property by negotiation and proceed under its license; and it should not be precluded from so doing." Beezer v. City of Seattle (1962), 60 Wn. (2d) 239, 243, 373 P. (2d) 796, 798.

The foregoing statement from the *Beezer* case makes clear the factual issue for determination in the litigation now pending in the Superior Court of King County (King County Superior Court civil cause No. 576444, Robert R. Beezer, Plaintiff, v. City of Seattle, Defendant; Public Utility District No. 1 of Pend Oreille County, Washington, Intervenor). This determination is necessary because of our statute[1] which has at all times since 1933 prohibited the condemnation by a city of the

> ". . . electric power and light plant or electric system, or any part thereof, belonging to or owned or operated . . . by a public utility district."

The city of Seattle has, at all times, taken the position that while the proper[illegible] of the public utility district which it proposes to condemn does not fall within this prohibition, nevertheless it is unnecessary to determine that fact because its license from the Federal Power Commission gives it the authority to condemn any property of the

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[1] "Every city or town owning its own electric power and light plant may exercise the power of eminent domain as provided by law for the condemnation of private property for any of the corporate uses or purposes of the city or town: *Provided*, That no city or town shall acquire, by purchase or condemnation, any publicly or privately owned electric power and light plant or electric system located in any other city or town except with the approval of a majority of the qualified electors of the city or town in which the property to be acquired is situated; *nor shall any city or town acquire by condemnation the electric power and light plant or electric system, or any part thereof, belonging to* or owned or operated by any municipal corporation, mutual, nonprofit, or cooperative association or organization, or by a *public utility district.*" RCW 35.84.030 (Emphasis supplied)

public utility district necessary to the development of the hydroelectric project it is licensed to develop and operate; in short, that it can exercise (under its license) a power which the state law has, since practically the inception of public utility districts, prohibited it from exercising.

We understand the reluctance of the Superior Court of King County to proceed, as we have directed, because of an intervening decision of the United States Court of Appeals for the District of Columbia in *Public Util. Dist. No. 1 of Pend Oreille County* v. *Federal Power Comm.* (August 30, 1962), 308 F. (2d) 318, cert. denied, 372 U.S. 908 (1963), 9. L. Ed. (2d) 716, 83 S. Ct. 719, petition for rehearing denied, 372 U.S. 956, 9 L. Ed. (2d) 980, 83 S. Ct. 950. This reluctance is doubtless strengthened by the concessions of counsel in their briefs in a recent motion to dismiss an appeal, and our own statements in the opinion denying the motion to dismiss (*Beezer* v. *Seattle* (Oct. 2, 1962), 60 Wn. (2d) 652, 375 P. (2d) 256).

The city of Seattle insists, and the King County Superior Court is apparently inclined to agree, that the United States Court of Appeals decision has rendered moot, and is res judicata of, the litigation now pending in that court.

The issues involved in that litigation are of such importance, and we are so completely convinced that we are right in the position taken in our opinion in *Beezer* v. *Seattle* (Public Util. Dist. No. 1 of Pend Oreille County, Intervenor), July 12, 1962, 60 Wn. (2d) 239, 373 P. (2d) 796, that we are unwilling, absent a decision by the United States Supreme Court, to accept the opinion of the United States Court of Appeals as decisive of those particular issues.

We recognize the finality of the Court of Appeals decision in *Public Util. Dist. No. 1 of Pend Oreille County* v. *Federal Power Comm., supra,* insofar as it determines that

the city of Seattle—and not Public Utility District No. 1 of Pend Oreille County—is entitled to a license from the Federal Power Commission to develop its hydroelectric project on the Pend Oreille River. We recognize also that our statute (RCW 35.84.030) does not preclude the city of Seattle from exercising that license and was no bar to its issuance. We are here concerned only with a limitation on the manner of its exercise. Our statute does not prohibit the city from condemning the property of the public utility district (hereinafter called P.U.D.) unless that property is its "electric power and light plant or electric system, or any part thereof."

When, in 1930, the state adopted (by the initiative) the public-utility-district law, it contained, and still does, a provision prohibiting such a district from condemning a public utility owned by a city or town (RCW 54.16.020). In 1933, the legislature made the prohibition work both ways—by forbidding any city or town from acquiring by condemnation

> ". . . the electric power and light plant or electric system, or any part thereof, belonging to or owned or operated . . . by a public utility district." RCW 35.84.030.

The obvious wisdom and desirability of such a prohibition has not heretofore been questioned, though public power has here moved further and faster through municipal corporations of varying character than in any other state; nor has the power of the state to place such a prohibition on the municipal corporations created by it been questioned.

Can the Federal Power Commission by a license granted to a city, existing under and by virtue of the laws of the state of Washington, give it a power which it has been prohibited from exercising by that state?

Here, stripped of all the trappings of res judicata and federal pre-emption, is the heart of this controversy. It presents a problem in federal-state relationships which can be decisively answered only by the United States Supreme Court.

Our right to determine the meaning of the statutes of this state is clear; and it is equally clear that in the construction of federal statutes only the decisions of the Supreme Court of the United States are binding upon us. As we said in *Home Insurance Co. of New York* v. *Northern Pacific Railway Co.* (1943), 18 Wn. (2d) 798, 808, 140 P. (2d) 507, 147 A.L.R. 849:

> "When a Federal statute is construed by a United States court of appeals, such construction is entitled to great weight with us when the same statute is involved in a case we are considering, but it is not binding on us if we do not deem it logical or sound. . . .
>
> ". . . In order that there may be no doubt about what the rule is in this state, we now declare it to be that the construction placed upon a Federal statute by the inferior Federal courts, while entitled to great weight by the courts of this state, is not binding upon them."

The refusal of the Supreme Court of the United States to review by certiorari the decision of the Court of Appeals for the District of Columbia adds nothing to that decision as it is not an expression by the Supreme Court of an opinion on the merits. *Elgin, J. & E. R. Co.* v. *Gibson* (1957), 355 U.S. 897, 2 L. Ed. (2d) 193, 78 S. Ct. 270; *Brown* v. *Allen* (1953), 344 U.S. 443, 491-92, 97 L. Ed. 469, 507, 73 S. Ct. 397, 437, 439; *United States* v. *Carver* (1923), 260 U.S. 482, 490, 67 L. Ed. 361, 364, 43 S. Ct. 181, 182.

Nor is res judicata applicable in the present case. The proceeding in the Court of Appeals for the District of Columbia (*Public Util. Dist. No. 1 of Pend Oreille County* v. *Federal Power Comm., supra*) was the review of an ad-

ministrative order of the Federal Power Commission granting a license to the city of Seattle. The parties were the city of Seattle, the Pend Oreille County P.U.D. (both seeking a license), and the Federal Power Commission.

The case now pending in the King County Superior Court is a taxpayer's suit in which Robert R. Beezer is plaintiff, the city of Seattle is defendant, and the Pend-Oreille P.U.D. is an intervenor. The subject matter is not the granting of a license under a federal statute, but whether the Federal Power Commission license having been granted the properties of the Pend Oreille County P.U.D., sought to be condemned by the city of Seattle, are its "electric power and light plant or electric system, or any part thereof." If that question is answered in the affirmative, there comes the further question: Has the city of Seattle the power to proceed with a condemnation of such properties? The answer is clearly in the negative so far as our state statutes are concerned, but there is the additional question of whether the Federal Power Commission license can give the city of Seattle such power notwithstanding the express prohibition of the state statute.

The subject matter, the parties, and the purpose of the proceedings are different; hence, the doctrine of res judicata does not apply. See *Burke Motor Co.* v. *Lillie* (1952), 39 Wn. (2d) 918, 239 P. (2d) 854; *Curtiss* v. *Crooks* (1937), 190 Wash. 43, 66 P. (2d) 1140.

Somewhat paradoxically we never reach this burning controversy, if it is determined that the property of the P.U.D. which the city seeks to condemn is *not* its "electric power and light plant or electric system, or any part thereof," within the purview of RCW 35.84.030.

The opinion of the Court of Appeals for the District of Columbia, to which we have been referring, after holding that Seattle has the right to condemn any property of the

P.U.D. despite our statutory prohibition, says that anyway the properties of the P.U.D., which the city of Seattle seeks to condemn, do not fall within the prohibition.

This later declaration seems to us no more than an advisory opinion on an issue then, and now, properly pending before the Superior Court of King County which we have heretofore directed that court to determine. This is the type of determination which the Supreme Court of the United States recently referred to as a "preliminary guess" regarding local law. *Leiter Minerals, Inc.* v. *United States* (1957), 352 U.S. 220, 229, 1 L. Ed. (2d) 267, 275, 77 S. Ct. 287, 292.

Mr. Justice Harlan, in his concurring opinion in *Tacoma* v. *Taxpayers of Tacoma* (1958), 357 U.S. 320, 342, 2 L. Ed. (2d) 1345, 1358, 78 S. Ct. 1209, 1221, said:

> ". . . I do not understand the Court to suggest that the Federal Power Act endowed the Commission and the Court of Appeals with authority to decide any issues of state law if such law were deemed controlling, or that had the Court of Appeals undertaken to do so, such a determination would have foreclosed reexamination of such a decision in other proceedings."

It is our view that the decision and the opinion of the Court of Appeals for the District of Columbia in *Public Util. Dist. No. 1 of Pend Oreille County* v. *Federal Power Comm., supra,* is not decisive of the issues now pending in the Superior Court of King County, and that court should proceed in accordance with our former direction.

The writ of mandamus will issue.

HILL, J.

We concur:

OTT, C. J.

WEAVER, J.

HUNTER, J.

HALE, J.

APPENDICES

DONWORTH, J. (dissenting)—This is the fourth time this case has been before us in the past year. (*Beezer* v. *Seattle*, 60 Wn. (2d) 239, 373 P. (2d) 796 (1962), and *Beezer* v. *Seattle*, 60 Wn. (2d) 652, 375 P. (2d) 256 (1962); in addition, a motion for a stay of proceedings made by the city of Seattle was argued and denied without opinion on November 19, 1962.)

The present proceeding is an application for a writ of mandamus to compel the superior court to proceed with the trial of the cause on the merits as directed by this court in the decision first above cited.

The history of this litigation is described in some detail in the dissenting opinions in the two prior decisions.

The last paragraph of the first dissent reads as follows:

> "Because the F.P.C. did not find it necessary to decide the question urged upon us by appellants and for the further reason that the court of appeals has exclusive jurisdiction of the controversy, it is my opinion that the trial court correctly held that it had no jurisdiction of the controversy, and its judgment dismissing the action should be affirmed."

When the case came before us the second time, the United States Court of Appeals for the District of Columbia had just rendered its decision upholding the order of the Federal Power Commission, issued July 10, 1961, granting a license to the city of Seattle to construct and operate the Boundary Dam, and denying the PUD's application for a similar license with respect to its proposed adjacent Z Canyon project. See *Public Utility Dist. No. 1 of Pend Oreille County* v. *Federal Power Commission*, 308 F. (2d) 318.[1]

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[1] The pertinent portion of the decision of the Court of Appeals states:

"What precedes makes it clear that the State statute, here involved, even if according to its own terms it is applicable, cannot

The majority opinion of this court, denying the city's motion to dismiss the PUD's appeal from the trial court's dismissal of the case for lack of jurisdiction, concluded as follows:

> "We are advised that Public Utility District No. 1 of Pend Oreille County will petition the Supreme Court of the United States to review, by certiorari, the circuit court's affirmance of the order of the Federal Power Commission; and, pending such review, we do not accept the conclusions of the circuit court as res judicata of the issues heretofore determined by this court in its opinion of August 3, 1962. Nor do the conclusions of the circuit court render moot the issues presented to us for determination, *unless, and until,* the judgment of the circuit court becomes final and binding on Public Utility District No. 1 of Pend Oreille County, Washington." (Italics mine.)

In the dissenting opinion, it was stated that the controversy before this court was then moot because the sole issue of fact to be tried in the superior court had become

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make it impossible for Seattle as a federal licensee to condemn under the federal statute. Were it otherwise—i.e., if indeed the limitation of the state-granted right of eminent domain prevented the exercise of federally-granted power of condemnation in the area proscribed by it—PUD's argument that it disables Seattle in this situation could not be upheld. For, it does not appear that the land owned by PUD and needed by Seattle is a part of the former's electric plant or system which the Washington statute protects from condemnation by a city or town. The record does not show that the property here involved is used by PUD in its operations, or that in the future it will be useful to PUD in any way except in connection with its Z Canyon project which has been foreclosed by the grant of the license to Seattle. So, after the City's license is finally affirmed and it begins condemnation, the site now owned by PUD will not be in any sense a part of its electric plant or system and the State statute, even if in this situation it were effective according to its terms, would not prevent Seattle from condemning the needed land."

immaterial under the decision of the court of appeals. It was there said:

> ". . . It could become material only if the United States Supreme Court should (a) grant the public utility district's proposed petition for certiorari and (b) subsequently reverse the decision of the Court of Appeals. . . ."

Now that the PUD *has* petitioned the United States Supreme Court for a writ of certiorari to review the decision of the Court of Appeals, and its petition *has been* denied (372 U.S. 908, 9 L. Ed. (2d) 716, 83 S. Ct. 719), and notwithstanding the fact that the PUD has petitioned for a rehearing of its certiorari petition and that the latter has been denied by the Supreme Court (372 U.S. 956, 9 L. Ed. (2d) 980, 83 S. Ct. 950), the majority of this court still persist that "we are so completely convinced that we are right in the position taken in our opinion" in the first *Beezer* case (60 Wn. (2d) 239, 373 P. (2d) 796), "that we are unwilling, absent a decision by the United States Supreme Court, to accept the opinion of the United States Court of Appeals as decisive of those particular issues."

This position seems to me to be inconsistent with the statement of the majority in the second *Beezer* decision to the effect that the issues would not become moot "unless, and until" the judgment of the court of appeals should become final and binding on the PUD.

That judgment is now final and binding on the PUD, and the original issues before us have become moot, but the majority refuses to accept the decision of the only court that has jurisdiction to decide these issues unless and until the United States Supreme Court reviews that decision. Since that court has refused to review the decision of the court of appeals, I see no escape from the conclusion that the litigation is now ended.

Even if the views expressed in the two prior dissents be considered as premature, the issues before the superior court are now certainly moot. The very things that the majority previously said would cause the issues to become moot have now occurred, and, if there ever was any basis for a contrary holding, there is now no basis for the majority opinion in the present appeal.

In my opinion, the writ of mandamus should be denied.

DONWORTH, J.

We concur, ROSELLINI, J.
HAMILTON, J.

I fully concur in Judge Donworth's dissent. In my judgment, its logic and common-sense views are unanswerable.

FINLEY, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Order Denying Petition for Rehearing

No. 37037

ROBERT R. BEEZER, *Plaintiff and Relator,*

v.

THE CITY OF SEATTLE, ET AL., *Defendant and Respondent,*

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, *Intervenor and Relator,* THE SUPERIOR COURT FOR KING COUNTY, W. R. COLE, JUDGE, *Respondent.*

The Court having considered the defendant-respondents' petition for a rehearing herein, together with the answer of Public Utility District No. 1 of Pend Oreille County and the answer of Relator Beezer, and a majority of the Judges being of the opinion that it should be denied,

IT IS ORDERED that the petition be and it is hereby denied.
Dated this 7th day of October, 1963.
By the Court.

/s/ RICHARD B. OTT
Chief Justice

162 Wash. Dec. 559

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Remittitur

No. 37037

King County No. 576444

ROBERT R. BEEZER, *Plaintiff and Relator,*

v.

THE CITY OF SEATTLE, ET AL., *Defendant and Respondent,*

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON, *Intervenor and Relator,*

THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY, THE HONORABLE W. R. COLE, JUDGE,
Respondent.

This is to certify that the opinion of the Supreme Court of the State of Washington filed on July 18, 1963, became the final judgment of this court in the above entitled case on October 7, 1963. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as follows:

Costs will abide the final determination of the cause. The Petition for Rehearing was Denied October 7, 1963. A copy of Peremptory Writ of Mandamus attached.

cc: Court Reporter
Mr. Clarence C. Dill
Schweppe, Reiter, Doolittle & Krug
Mr. Alfred J. Schweppe
Hon. A. C. VanSoelen
Mr. A. L. Newbould
Helsell, Paul, Fetterman, Todd
and Hokanson
Mr. Richard S. White
Mr. Richard W. Bartke
Mr. William G. Ennis

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 7th day of October, A.D. 1963.

William M. Lowery
Clerk of the Supreme Court,
State of Washington.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 37037

Peremptory Writ of Mandamus

ROBERT R. BEEZER, *Plaintiff and Relator,*

v.

THE CITY OF SEATTLE, ET AL., *Defendant and Respondent,*

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON, *Intervenor and Relator,*

THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY, THE HONORABLE W. R. COLE, JUDGE, *Respondent.*

TO THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR KING COUNTY, HONORABLE W. R. COLE, JUDGE THEREOF

WHEREAS, it appears from the petition for a writ of mandamus filed herein by the relator, and joined in by the intervenor, that the respondent, Honorable W. R. Cole, sitting as judge of the Superior Court of the State of Washington for King County, has decided to dismiss for want of jurisdiction that certain action entitled *Robert R. Beezer, plaintiff,* v. *The City of Seattle, et al., defendants, Public Utility District No. 1 of Pend Oreille County, Washington, Intervenor,* being cause No. 576444 in the files and records of said court, and has stated that he will enter an order and judgment to that effect, and

WHEREAS, this court issued an alternative writ of mandamus commanding and ordering that the respondent, the said Superior Court of the State of Washington for King County and the said Honorable W. R. Cole, Judge, appear before this court at Olympia, Washington on the 9th day of May, 1963 to show cause why a writ of mandamus should not be issued by this court directing him to proceed to trial in said cause No. 576444, and

WHEREAS, this court on May 9, 1963 considered the petition of relator and the return of the respondent, and

WHEREAS, on July 18, 1963 it was the decision of this court that said cause No. 576444 should proceed to trial and that said King County Superior Court has full and complete jurisdiction to proceed with the trial of said cause on its merits and the decision of the supreme court having become final on October 7, 1963; NOW THEREFORE, in conformity with the decision of this court, IT IS HEREBY

ORDERED that the respondent, the Superior Court of the State of Washington for King County and the said W. R. Cole, Judge, shall proceed forthwith to the trial and entry of judgment on the merits in King County Superior Court Cause No. 576444 entitled Robert R. Beezer, plaintiff, v. The City of Seattle et al., defendants, Public Utility District No. 1 of Pend Oreille County, Washington, intervenor.

Dated this 7th day of October, 1963.

/s/ RICHARD B. OTT
Chief Justice

APPENDIX B

Opinion of the Court of Appeals of August 30, 1962
(308 F. 2d 318 (D. C. Cir. 1962))

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,653

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT
CITY OF SEATTLE, INTERVENOR

Petition for Review of Order of the Federal Power Commission

Decided August 30, 1962

Messrs. Clarence C. Dill and *Joseph Volpe, Jr.*, with whom *Mr. Bennett Boskey* was on the brief, for petitioner.

Miss Josephine H. Klein, Attorney, Federal Power Commission, with whom *Messrs. Ralph S. Spritzer*, General Counsel, Federal Power Commission, at the time the brief was filed, *Howard E. Wahrenbrock*, Solicitor, *Leonard D. Eesley*, Assistant General Counsel, and *Joseph B. Hobbs*, Attorney, were on the brief, for respondent. *Mr. Arthur H. Fribburg*, Attorney, Federal Power Commission, also entered an appearance for respondent.

Mr. Richard S. White, of the bar of the Supreme Court of Washington, *pro hac vice*, by special leave of court, with whom *Messrs. Robert L. McCarty* and *Charles F. Wheatley, Jr.*, were on the brief, for intervenor.

Before WILBUR K. MILLER, *Chief Judge*, and BAZELON and BASTIAN, *Circuit Judges*.

WILBUR K. MILLER, *Chief Judge:* On July 29, 1957, the City of Seattle applied to the Federal Power Commission

for a license[1] to construct and operate a hydroelectric project at what is called the "Boundary" site on the Pend Oreille River. Public Utility District No. 1 of Pend Oreille County, a municipal power corporation of the State of Washington, on August 27, 1957, petitioned to intervene, and later filed an application for a license for a similar project at its Z Canyon site, about one mile south of Seattle's "Boundary" location. At a hearing conducted by the Commission on these mutually exclusive applications, PUD argued that certain employees of the U. S. Bureau of Reclamation, who prepared the technical portions of Seattle's original application[2] and accepted compensation therefor, thereby violated 18 U. S. C. § 281,[3] often called a conflict of interest statute, and that the City of Seattle was equally guilty under 18 U. S. C. § 2.[4] PUD

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[1] Under Section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e), 49 STAT. 839.

[2] One of them testified at the hearing before the examiner.

[3] Section 281 is, in pertinent part, as follows:

"Whoever, being a Member of or Delegate to Congress, or a Resident Commissioner, either before or after he has qualified, or the head of a department, or other officer or employee of the United States or any department or agency thereof, directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party or directly or indirectly interested, before any department, agency, court martial, officer, or any civil, military, or naval commission, shall be fined not more than $10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States."

[4] Section 2 is as follows:

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

"(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

insisted that, because of these alleged criminal acts, the material prepared by the government employees should be rejected, and Seattle should be disqualified as an applicant.

The examiner gave careful consideration to PUD's contention concerning § 281 and found the record presented "no conceivable conflict of interest," and on rehearing the Commission said on that subject:

> ". . . On the record before us, we can find no conflict of interest which as a matter of policy would impel us to exclude the testimony and exhibits in question. And apart from such a conflict of interest as might require their exclusion as a matter of policy, we know of no basis in law or equity for excluding said testimony and exhibits. We cannot conclude, as PUD would have us do, that the appearance of Mr. Winter [the Board of Reclamation witness] and the admission into evidence of exhibits prepared by him and others constitute an assault upon the 'integrity of the administrative process' which requires dismissal of Seattle's application."

So, the Commission sustained the examiner's ruling on the conflict of interest question; and in accordance with his recommendation also rejected the other arguments of PUD and awarded a license to Seattle. PUD petitions for review.

Vigorously pressing upon us its contention that the Commission erred in not dismissing Seattle's application because of the alleged violations of § 281, PUD relies, *inter alia*, on the Dixon-Yates case[5] and *May* v. *United States*, 84 U. S. App. D. C. 233, 175 F. (2d) 994, *cert. denied* 338 U. S. 830 (1949).

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[5] United States v. Mississippi Valley Generating Co., 364 U.S. 520 (1961).

The Supreme Court held in the Dixon-Yates case that the primary purpose of the statute there involved[6] "is to protect the public from the corrupting influences that might be brought to bear upon government agents who are financially interested in the business transactions which they are conducting on behalf of the Government." The Court said a criminal prosecution is not the Government's sole remedy in a case such as Dixon-Yates, and that the public interest can be fully protected "only if contracts which are tainted by a conflict of interest on the part of a government agent *may* be disaffirmed by the Government." (Emphasis added.) 364 U.S. at 563.

But the Dixon-Yates case does not hold, nor does any other authority to our knowledge, that a transaction is automatically void because there may have been involved in it a technical violation of the conflict of interest statutes. Neither the Government nor any of its agencies has attacked the grant of a license to Seattle as being contrary to the public interest because of the alleged violations of § 281, and no criminal action has been instituted against the parties accused by PUD.

The case of *May* v. *United States*, cited by the petitioner, holds, 84 U. S. App. D. C. at 245, 175 F. (2d) at 1006:

> "... [I]f a Congressman receives compensation for services rendered by him to a person in relation to any matter in which the United States is interested, before any Government department, he is guilty of violating the statute [18 U. S. C. § 216], even though the service rendered was a proper act on his part. ..."

But the Government department before which May appeared was not required to repudiate or disregard things properly said or done by him in his appearances merely because he may have violated the law by receiving com-

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[6] 18 U.S.C. § 434.

pensation for appearing. For this reason we think the *May* case is not helpful to petitioner here.

We find nothing in the record to indicate that there was here the "influence peddling" at which § 281 was aimed. No corrupt or venal motive is shown on the part of Seattle or the Bureau of Reclamation engineers, and it does not appear that the Commission gave any more weight to the material furnished by the government employees than if it had been prepared by others. Moreover, § 281, a criminal statute, prescribes no civil or administrative sanctions. Even if it has been technically violated here, it does not follow that the grant of a license to Seattle should be set aside for that reason alone.

In another argument against the Commission's grant of a license to the City, PUD suggests that Seattle is not qualified to be a licensee, as it cannot acquire by purchase land indispensably necessary to its project because PUD owns the land and is unwilling to sell it. It further suggests that Seattle is unable to acquire the land by condemnation because the Washington statute which confers the powers of eminent domain on a city which owns its own electric power and light plant forbids its exercise with respect to "the electric power and light plant or electric system, or any part thereof, belonging to or owned or operated . . . by a public utility district."[7] For these reasons, PUD contends that Seattle did not and cannot submit to the Commission

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[7] Revised Code of Washington (1951), § 35.84.030:

"§ 35.84.030. LIMITATION ON RIGHT OF EMINENT DOMAIN. Every city or town owning its own electric power and light plant may exercise the power of eminent domain as provided by law for the condemnation of private property for any of the corporate uses or purposes of the city or town: *Provided*, That no city or town shall . . . acquire by condemnation the electric power and light plant or electric system, or any part thereof, belonging to or owned or operated . . . by a public utility district."

> "[s]atisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks . . ."

as required by Section 9(b) of the Federal Power Act.[8] It is said that, therefore, Seattle's application should have been denied.

The Supreme Court has held that Section 9(b) does not in itself require compliance with state law; it only empowers the Commission to require such evidence of compliance with state law as, in the Commission's judgment, would be "appropriate to effect the purposes of a federal license on the navigable waters of the United States." *First Iowa Hydro-Elec. Coop.* v. *Federal Power Comm'n*, 328 U. S. 152, 167 (1946). Strictly speaking, the question is not whether Seattle has complied or can comply with the state eminent domain statute, but rather whether the limiting provision of that statute prevents Seattle from exercising the right of condemnation conferred on it by Section 21 of the Federal Power Act.[9] That is to say, once Seattle has become a federal licensee, does the pro-

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[8] 16 U.S.C. § 802(b), 41 STAT. 1068.

[9] 16 U.S.C. § 814, 41 STAT. 1074:

> "Sec. 21. That when any licensee can not acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. . . ."

hibitory provision of the state condemnation statute disable it from going forward with its federally-licensed project by preventing it from condemning under Section 21 of the Federal Power Act the land necessary for its purposes?

A similar problem was presented to the Ninth Circuit in *State of Washington Dept. of Game* v. *Federal Power Comm'n.*[10] There a license issued by the Power Commission to the City of Tacoma was attacked because the City had not obtained the approval of certain State officials as required by statutes of Washington and because the proposed dams would exceed the height limits the Washington legislature had put upon dams in the streams involved. The objectors contended that Tacoma, a creature of the State of Washington, could not act in opposition to the policy of the State or in derogation of its laws.

Relying on the *First Iowa case, supra,* the Court of Appeals for the Ninth Circuit held that "the state laws cannot prevent the Federal Power Commission from issuing a license or bar the licensee from acting under the license to build a dam on a navigable stream since the stream is under the dominion of the United States." 207 F. (2d) at 396. After this unequivocal holding, the Ninth Circuit went on to say:

> ". . . However, we do not touch the question as to the legal capacity of the City of Tacoma to initiate and act under the license once it is granted. There may be limitations in the City Charter, for instance, as to indebtedness limitations. Questions of this nature may be inquired into by the Commission as relevant to the practicability of the plan, but the Commission has no power to adjudicate them."

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[10] 207 F. (2d) 391 (1953), *cert. denied* 347 U.S. 936 (1954).

PUD relies on this language in arguing the court did not hold that Tacoma might act under the federal license in a manner prohibited by state law.

In *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U. S. 320 (1958), the Supreme Court, in considering the same argument which PUD advances here, had occasion to construe the Ninth Circuit opinion. It said, at pages 339-40:

> "But the respondents say that the Court of Appeals did not decide the question of legal capacity of the City to act under the license and, therefore, its decision is not final on that question, but left it open to further litigation. They rely upon the following language of the opinion:
>
> " '[. . .] However, we do not touch the question as to the legal capacity of the City of Tacoma to initiate and act under the license once it is granted. There may be limitations in the City Charter, for instance, as to indebtedness limitations. Questions of this nature may be inquired into by the Commission as relevant to the practicability of the plan, but the Commission has no power to adjudicate them.' [207 F. (2d) at 396.]
>
> "We believe that respondents' construction of this language is in error. The questioned language expressly refers to possible 'indebtedness limitations' in the City's Charter and 'questions of this nature,' *not to the right of the City to receive and perform, as licensee of the Federal Government under the Federal Power Act, the federal rights determined by the Commission and delegated to the City as specified in the license. . . .*" (Emphasis added.)

What precedes makes it clear that the State statute here involved, even if according to its own terms it is applicable, cannot make it impossible for Seattle as a federal licensee to condemn under the federal statute.

Were it otherwise—*i.e.*, if indeed the limitation of the state-granted right of eminent domain prevented the exercise of federally-granted power of condemnation in the area proscribed by it—PUD's argument that it disables Seattle in this situation could not be upheld. For, it does not appear that the land owned by PUD and needed by Seattle is a part of the former's electric plant or system which the Washington statute protects from condemnation by a city or town. The record does not show that the property here involved is used by PUD in its operations, or that in the future it will be useful to PUD in any way except in connection with its Z Canyon project which has been foreclosed by the grant of the license to Seattle. So, after the City's license is finally affirmed and it begins condemnation, the site now owned by PUD will not be in any sense a part of its electric plant or system and the State statute, even if in this situation it were effective according to its terms, would not prevent Seattle from condemning the needed land.

PUD attacks the Commission's action on several other grounds. Among them is the contention that the Commission deprived it of "a fair hearing on the economic and engineering feasibility of the conflicting projects by reserving for subsequent *ex parte* adjudication substantial issues relating to mine damage." The argument is based on the fact that Seattle did not propose, and the Commission did not require, elaborate and expensive precautions against damage to extensive lead and zinc mines in the area which PUD says may result from the construction of Seattle's dam.

Mining interests intervened before the Commission, contending that neither project should be licensed because either would threaten substantial permanent damage to their properties. Many expert witnesses testified on the mine damage issue, which was heard separately. The examiner concluded the possibility of damage was too slight and remote to require the refusal of a license. The

Commission agreed. It said it did not anticipate serious damage to the mines from the Boundary reservoir but did require that certain steps be taken to guard against it. In addition, the Commission inserted the following in Seattle's license:

> "Article 43. The licensee shall take appropriate measures to assure the watertightness of the reservoir, and the Commission reserves the right to require the licensee to take such measures both prior to and after the initial filling of the reservoir."

This is the so-called reservation of the mine damage issue "for subsequent *ex parte* adjudication" which PUD says deprived it of a fair hearing on the economic and engineering feasibility of the projects.

We consider Article 43 as no more than a requirement that, in addition to the specific precautionary measures prescribed elsewhere in the license, the licensee meet any unforeseen condition which may develop, and an assurance that the Commission will exercise continuous supervision over the project. The record justified the action of the Commission in this regard and did not demonstrate the necessity for making any further requirements of the licensee. We regard it as significant that the mining interests have not petitioned for review and have not sought to intervene in this proceeding.

The remaining points urged by PUD do not seem to us to require discussion. They relate to matters about which the Commission had discretion which it did not abuse.

Affirmed.

APPENDIX C

Opinion of the Supreme Court of Washington of July 12, 1962 (60 Wn. 2d 239, 373 P. 2d 796 (1962))

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 36486

EN BANC

ROBERT R. BEEZER, *Appellant*,

v.

THE CITY OF SEATTLE, GORDON S. CLINTON, as Mayor of said City, and M. B. MITCHELL, DAVID LEVINE, CHARLES M. CARROLL, CLARENCE F. MASSART, J. D. BRAMAN, MYRTLE S. EDWARDS, FLOYD C. MILLER, BOB JONES and PAUL J. ALEXANDER, as the duly constituted Council of the City of Seattle, *Respondents*,

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON, *Intervenor-Appellant*.

Filed July 12, 1962

The issue presented is another and, as yet, unexplored facet of the obligation of a municipal corporation, existing under and by virtue of the laws of the state of Washington, to comply with the laws of that state.

The city of Seattle has applied for and received a license from the Federal Power Commission for the development of a hydroelectric project on the Pend Oreille River (referred to herein as the Boundary project), and involving the construction of a dam on a site presently owned by Public Utility District No. 1 of Pend Oreille County. (It is conceded that the city intends to condemn this and other property of the P.U.D.)

In 1930, the people of this state adopted, by the initiative, the public-utility-district law,

> "... to conserve the water and power resources of the State of Washington for the benefit of the people

> thereof, and to supply public utility service, including water and electricity for all uses." Laws of 1931, chapter 1, § 1, p. 3.

As adopted, it contained, and still does, a provision forbidding a district created thereunder from condemning any public utility owned by a city or town (RCW 54.16.020).

In 1933, the legislature made the prohibition work both ways by forbidding any city or town from acquiring by condemnation,

> ". . . the electric power and light plant or electric system, or any part thereof, belonging to or owned or operated . . . by a public utility district." RCW 35.84.030[1]

This is a declaratory judgment action predicated on the proposition that the city of Seattle, faced with this express prohibition, cannot acquire by condemnation the property of Public Utility District No. 1 of Pend Oreille County; and, consequently, should be enjoined from the expenditure of money in the furtherance of a project which it cannot complete.

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[1] "Every city or town owning its own electric power and light plant may exercise the power of eminent domain as provided by law for the condemnation of private property for any of the corporate uses or purposes of the city or town: *Provided*, That no city or town shall acquire, by purchase or condemnation, any publicly or privately owned electric power and light plant or electric system located in any other city or town except with the approval of a majority of the qualified electors of the city or town in which the property to be acquired is situated; nor shall any city or town acquire by condemnation the electric power and light plant or electric system, or any part thereof, belonging to or owned or operated by any municipal corporation, mutual, nonprofit, or cooperative association or organization, or by a public utility district." RCW 35.84.030.

The trial court entered a summary judgment dismissing the action, apparently believing that the issue had been determined in the prior litigation involving the right of the city of Tacoma to build dams on the Cowlitz River.[2]

We do not regard anything actually decided in the Cowlitz litigation as decisive of the present case. In the first place, it was conceded that when the city of Tacoma received its license to proceed with the Cowlitz project and construct the necessary dams, there was nothing limiting its authority so to do. Here, the city of Seattle, at the time it applied for its license to proceed with the Boundary project, had a known and express limitation on its power, *i.e.*, it could not condemn

> ". . . the electric power and light plant or electric system, or any part thereof, belonging to or owned or operated . . . by a public utility district."

This was not necessarily a disqualification as a licensee, because it was entirely possible, and for a time appeared probable, that the city would acquire by mutual agreement with the P.U.D. the property it required.

In the second place, it has been, and is, our view that the Supreme Court of the United States in *City of Tacoma* v. *Taxpayers* (1958), 357 U. S. 320, 2 L. Ed. (2d) 1345, 78 S. Ct. 1209, did not pass upon the proposition which we deemed decisive in our second Cowlitz case (*City of Tacoma* v. *Taxpayers* (1957), 49 Wn. (2d) 781, 307 P. (2d) 567), *i.e.*, that the Federal government may not

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[2] In chronological reverse order the decisions are: *City of Tacoma* v. *Taxpayers* (1962), 160 Wash. Dec. 64, 371 P. (2d) 938 (our third Cowlitz case); *City of Tacoma* v. *Taxpayers* (1958), 357 U.S. 320, 2 L. Ed. (2d) 1345, 78 S. Ct. 1209; *City of Tacoma* v. *Taxpayers* (1957), 49 Wn. (2d) 781, 307 P. (2d) 567 (our second Cowlitz case); *City of Tacoma* v. *Taxpayers* (1953), 43 Wn. (2d) 468, 262 P. (2d) 214 (our first Cowlitz case); *State of Washington Department of Game* v. *Federal Power Commission* (1953), 207 F. (2d) 391 (C.A. 9th).

confer powers upon local units of government created by the state beyond the capacity given them by their creator. The Supreme Court of the United States reversed our decision in that case on the basis of res judicata, stating that the state of Washington and its citizens were foreclosed by the judgment in the Court of Appeals (*State of Washington Department of Game* v. *Federal Power Commission* (1953), 207 F. (2d) 391 (C.A. 9th)), from litigating further the power and authority of the city of Tacoma to proceed under its Federal Power Commission license to build dams. (In the present case, it is urged that the federal government, through the Federal Power Commission, may confer upon the city of Seattle, through its license, powers which the city was expressly prohibited by state statute from exercising at the time it made its application for a license to proceed with the Boundary project.)

The city of Seattle's power of eminent domain has been at all times, since the effective date of RCW 35.84.030, *i.e.*, 1933, subject to the prohibition set forth in that act (heretofore quoted in note 1). This is clearly a declaration of the public policy of the state, dating back thirty years, and is in no sense an attempt to exercise a veto over said project.

Whether the Federal Power Commission can confer powers of condemnation on cities which the state legislature has, as a matter of policy, expressly prohibited, the federal courts must determine. If the city of Seattle could accept such a license only subject to an existing express statutory prohibition, which precluded its condemnation of P.U.D. property of the character described in RCW 35.84.030, then it is indisputable that a controversy exists which must be determined in accordance with the law of the state of Washington; and neither the Federal Power Commission nor the federal courts can make a conclusive determination on that point. That controversy is whether the property of the P.U.D., which the city of Seattle con-

cedes it intends to condemn, is within the statutory prohibition, *i.e.*, is an "electric power and light plant or electric system, or any part thereof." We are here concerned with the interpretation and application of state law, and our courts should not hesitate to proceed with that interpretation and application.

We, therefore, set aside the summary judgment of dismissal, and direct the trial court to proceed with the determination of whether the property of the P.U.D., which the city of Seattle now takes the position it must condemn, is an "electric power and light plant or electric system, or any part thereof." If it is not, the action should be dismissed and the city left free to proceed to exercise its power of condemnation. If it is, we do not presume to suggest to the trial court what its action should be, because, as we have indicated, the city may find that if it has no power of condemnation, it may still be possible to acquire the property by negotiation and proceed under its license; and it should not be precluded from so doing.

HILL, J.

WE CONCUR:

WEAVER, J.

ROSELLINI, J.

OTT, J.

FOSTER, J.

HUNTER, J.

DONWORTH, J. (dissenting)—In order to understand the principal issue involved in this case it is necessary to state the history of the dispute rather fully. The principal litigants are the city of Seattle (herein called the city), which desires to construct a dam on the Pend Oreille River, a navigable stream in northeastern Washington, for the development of a hydroelectric project (referred

to as the Boundary project) and Public Utility District No. 1 of Pend Oreille County (herein referred to as the P.U.D.), which desires to develop a hydroelectric project on land owned by it on the same river at Z Canyon, which is about a mile upstream from the location of the city's proposed dam.

A brief chronological statement of proceedings material to our consideration of this case follows:

October, 1953—The city applied to the Federal Power Commission (herein called the F.P.C.) for a preliminary permit for the hydroelectric project above referred to (designated as Project No. 2144). Notice thereof was duly published.

January, 1954—The P.U.D. timely filed with the F.P.C. a petition in intervention in opposition to the issuance of the preliminary permit on several grounds, including the contention that RCW 35.84.030 was an absolute prohibition against the condemnation by the city of the P.U.D.'s property. This petition to intervene was granted February 5, 1954. No other person petitioned to intervene in this proceeding.

August 30, 1954—A three-year preliminary permit was issued to the city.

July 29, 1957—The city filed an application for a license to construct the proposed Boundary dam. Notice thereof was duly published.

August, 1957—The P.U.D. again petitioned the F.P.C. for leave to intervene, raising the contention that, for the reason stated above, RCW 35.84.030 prevented the city from performing under a license, if granted. Permission to intervene was granted October 7, 1957.

September 5, 1958—The P.U.D. filed an application for a license to construct a dam on the Pend Oreille River about a mile upstream from the location of the city's

proposed dam. The P.U.D.'s project was designated as Project No. 2250. The city's petition to intervene in this proceeding was granted.

October 20, 1958—The F.P.C. entered an order consolidating both projects for hearing. Since these two projects overlapped to such an extent that a license could not be granted to each applicant, the F.P.C., under § 7(a) of the Federal Power Act, was required to decide which project (if either) complied with the criteria prescribed by the act for the development of the Pend Oreille River.

December 1, 1958—The P.U.D. moved for the dismissal of the city's application for a license regarding Project No. 2144 on the ground that the city was without legal capacity to apply for or receive such license because "the laws of the State of Washington expressly prohibit Seattle from acquiring such properties of the District by condemnation." This motion to dismiss was passed for consideration until after the hearing on the merits.

January 15, 1959 to February 23, 1960—Hearings were held from time to time before an examiner at which testimony and documentary evidence were received as to the merits of the two projects. In the city's brief in this court it is stated that these hearings consumed 126 days and produced a transcript consisting of 17,228 pages, and that some 450 exhibits were introduced in evidence at the hearings.

March 10, 1961—The examiner who presided at the consolidated hearings filed his decision in which he denied the P.U.D.'s motion to dismiss the city's application for a license (based on RCW 35.84.030) and recommended that a license be issued to the city for Project No. 2144. The examiner's decision included the following statement:

> "It is further concluded that upon the conditions set out in the order issued herewith, the project proposed by the City of Seattle for construction, maintenance and operation at the Boundary site on the

> Pend Oreille River is best adapted to a comprehensive plan for improving and developing the reach of the Pend Oreille River between Project No. 2042 [Box Canyon dam owned and operated by PUD][1] and the United States-Canadian border."

The examiner further stated that the P.U.D. had failed to produce probative and convincing evidence that there was, or in the near future would be, a market for a substantial portion of the electric power which would be produced by Project No. 2250.

The P.U.D. filed objections to the examiner's decision and included its argument that the city could not perform under its license (if issued) because of RCW 35.84.030.

July 10, 1961—After oral argument before the members of the F.P.C., the Commission issued its order granting a license to the city for Project No. 2144 and dismissing the P.U.D.'s application for a license for Project No. 2250. The Commission adopted the examiner's decision (as modified by its order) as the decision of the Commission. Its decision included the following findings:

> "(4) Seattle is a municipality within the meaning of Section 3(7) of the Act, and has submitted satisfactory evidence of compliance with the requirements of all applicable state laws insofar as necessary to effect the purposes of a license for Project No. 2144."

August 8, 1961—The P.U.D. filed with the Commission a petiton for rehearing, again raising the question of the

[1] The Box Canyon Dam (Project No. 2042) is located on the Pend Oreille River about fifteen miles upstream from the site of the proposed Z Canyon dam (Project No. 2250), for the construction of which the P.U.D. was seeking a license from the F.P.C. and for which its application was dismissed by the Commission's order of July 10, 1961. The Box Canyon dam was involved in *State ex rel. P.U.D. No. 1* v. *Schaub*, 40 Wn. (2d) 814, 246 P. (2d) 1081 (1952).

city's inability to condemn its property because of RCW 35.84.030.

September 6, 1961—This petition for rehearing was denied by further opinion and order of the Commission. Concerning the power of the city to condemn the P.U.D.'s property and the city's compliance with § 9(b) of the Federal Power Act, the Commission said:

> "PUD contends that the Commission erred in adopting the examiner's discussion and disposition of the issue as to whether Seattle has power to acquire by condemnation lands belonging to PUD and necessary for Seattle to effect the purposes of the license issued to it. The examiner denied PUD's motion to dismiss Seattle's application because of its inability to comply with the requirements of Section 9(b) of the Federal Power Act, and concluded that should Seattle receive a license, its power to acquire the properties in question is clear under *City of Tacoma* v. *Taxpayers*, 357 U. S. 320.
>
> "PUD takes the position that Seattle is powerless to acquire PUD's lands by reason of a specific prohibition in Section 35.84.30 [.030] of the Revised Code of Washington (1951); that Seattle cannot qualify as an applicant for a license because of its inability to show compliance with the requirements of state law as required by Section 9(b) of the Federal Power Act; and that the Washington statute's restriction on Seattle's capacity to condemn PUD's properties is an impediment to Seattle's exercise of the right granted to a licensee by Congress in Section 21 of the Federal Power Act to acquire necessary properties by eminent domain in the federal courts. We need not decide in this proceeding whether Seattle is prohibited by state law from acquiring the particular properties of PUD in question. In our opinion Seattle's right to acquire these properties by the exercise of the power

of eminent domain under Section 21 of the Federal Power Act is well established. *FPC* v. *Tuscarora Indian Nation*, 362 U. S. 99; *City of Tacoma* v. *Taxpayers, supra; First Iowa Hydro-Electric Cooperative* v. *F.P.C.*, 328 U. S. 152; *State of Washington Department of Game* v. *FPC*, 207 F. (2d) 391, cert. den. 347 U. S. 936. And as we found in our order issuing license, Seattle has submitted satisfactory evidence of compliance with the requirements of all applicable state laws insofar as necessary to effect the purposes of the license."

It should be noted that the Commission did *not* decide whether or not the city was prohibited by RCW 35.84.030 from acquiring the P.U.D.'s properties by condemnation because, even if it were so prohibited, the city could exercise the power of eminent domain under § 21 of the Federal Power Act, which reads as follows:

"When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the

State where the property is situated: *Provided*, That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.00." 16 U.S.C. § 814.

September 26, 1961—The P.U.D. filed a petition with the United States Court of Appeals for the District of Columbia to review and set aside the orders of the Federal Power Commission above referred to. In its petition for review, one of the grounds for relief is stated as follows:

"(6) The Commission erred in concluding that Seattle has complied with Section 9(b) of the Federal Power Act, 16 U.S.C. § 802(b), which requires an applicant to submit satisfactory evidence of compliance with the laws of the state within which the project is located with respect to bed and banks of the river. The Commission erroneously concluded also that it need not decide whether the laws of Washington prohibit condemnation of the PUD's properties, on the basis of the case of *City of Tacoma* v. *Taxpayers*, 357 U. S. 320 and other cases it cited. The cases cited, for numerous reasons, are both noncontrolling and inapplicable. Moreover, these cases related to state laws forbidding a dam in a navigable stream instead of a law prohibiting the use of the power of condemnation by municipal corporations, one against the other, which makes no reference to a river. The Commission erroneously concluded that, even though it be assumed Seattle is incapacitated by state law from condemning PUD's properties, nevertheless Seattle has a right to acquire these properties by exercising the power of eminent domain under Section 21 of the Federal Power Act, 16 U.S.C. § 814. The Commission erroneously concluded that *City of Tacoma* v. *Taxpayers*, 357 U. S. 320, and the other

cases it cited, established that in the exercise of the eminent domain powers of Section 21 of the Federal Power Act, 16 U.S.C. § 814, Seattle could override the state's laws specifically limiting the intrastate relationship between a city and a public utility district. In these respects the Commission misinterpreted the Federal Power Act and its orders are in conflict with fundamental principles of law governing the division of authority under our Constitution between the state governments and the Federal Government. In addition, the Commission erred in failing and refusing to consider and to give proper weight, in the application of the Federal Power Act, to the policy expressed by the Washington statute which deprives Seattle of capacity to condemn PUD's properties."

The city's motion for permission to intervene was granted by the court of appeals. This cause (No. 16,653) was argued by both the P.U.D. and the city on May 7, 1962. As yet, no decision has been announced. Thus, the controversy is now resting in the bosom of the only court in the land that has competent jurisdiction to decide it. *City of Tacoma* v. *Taxpayers*, 357 U. S. 320, 2 L. Ed. (2d) 1345, 78 S. Ct. 1209.

It was stated by counsel at the oral argument in this court that the court of appeals had been requested by the P.U.D. to withhold its decision pending the final decision of this court construing RCW 35.84.030 with respect to the power of the city to condemn the P.U.D.'s property. The court of appeals has not indicated whether it will comply with this suggestion.

The case at bar was instituted on November 30, 1961, by a taxpayer and customer of the Seattle lighting department against the city for a declaratory judgment construing RCW 35.84.030. The P.U.D. was permitted to intervene in the trial court and contended that the statute should be construed as forbidding the city to condemn its

property. Whether the original plaintiff had standing to maintain a declaratory judgment action under the circumstances described above, it is not necessary to decide.

We have before us the same two adversary litigants (the P.U.D. and the city) who vigorously argued the merits of the question of the city's power (or lack of power) to condemn the P.U.D.'s property both before the Federal Power Commission and the court of appeals. At that time, there was no decision of this court construing RCW 35.84.030, and, of course, there still is none. The F.P.C. ruled that there was no necessity to consider RCW 35.84.030 at all because the city had authority to condemn the P.U.D. property under § 21 of the Federal Power Act quoted above.

The question before us is whether the trial court erred in holding that it had no jurisdiction to decide the same dispute which had been submitted to, and (for the reason just mentioned) was *not* decided by, the Federal Power Commission (and was then pending before the Court of Appeals). The hearing before the trial court was held on January 8, and 9, 1962.

As appellants contend, there is no doubt that, as a general proposition, a municipality is a creature which owes its existence and its power to function to state statutes and that it has only the powers vested in it by the legislature.

Neither is there any doubt concerning appellants' further contention that the interpretation of a statute by the highest court of the state with respect to a particular state of facts is binding on all Federal courts.

The determinative question is whether the Federal Power Commission has jurisdiction to issue a license when, in compliance with § 9(b) of the Federal Power Act, it has made a finding that the applicant has complied with the requirements of the laws of the state

with respect to the right to engage in the business of developing, transmitting, and distributing, and any other business necessary to effect the purposes of the license.

Having made such finding, the F.P.C. has power to proceed as it did under the act, unless the court of appeals upon review decides otherwise.

As I view the problem, it was so held by the Supreme Court of the United States in 1946, when it decided the case of *First Iowa Hydro Electric Coop.* v. *Federal Power Commission*, 328 U.S. 152, 90 L. Ed. 1143, 66 S. Ct. 906.

Even if the F.P.C. had passed on the applicability of RCW 35.84.030, the majority of the Supreme Court in the *First Iowa* case, *supra*, held that, under § 9(b) of the Federal Power Act, the Commission had jurisdiction to make a finding that the applicant had complied with all applicable state laws, even in the absence of state court decisions interpreting state statutes.

This is pointed up by the dissenting opinion of Mr. Justice Frankfurter, who differed with the majority on this one point. He said:

> "We are all agreed that Congress has the constitutional power to promote a comprehensive development of the nation's water resources and that it has exercised its authority by the Federal Power Act. 41 Stat. 1063, 49 Stat. 838; 16 U.S.C. §§ 791(a) *et seq.* See *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53; *New Jersey* v. *Sargent*, 269 U. S. 328; *United States* v. *Appalachian Power Co.*, 311 U. S. 377. And in view of Congress' power, of course this enactment overrides all State legislation in conflict with it. But the national policy for water power development formulated by the Federal Power Act explicitly recognizes regard for certain interests of the States as part of that national policy. This does not imply that general, uncritical notions about so-called 'States' rights' are

to be read into what Congress has written. It does mean that we must adhere to the express Congressional mandate that the public interest which underlies the Federal Power Act involves the protection of particular matters of intimate concern to the people of the States in which proposed projects requiring the sanction of the Federal Power Commission are to be located. By § 9(b) of the Act, 41 Stat. 1063, 1068; 16 U.S.C. § 802(b), Congress explicitly required that before the Commission can issue a license for the construction of a hydro-electric development, such as the proposed project of the petitioner, the Commission must have 'satisfactory evidence that the applicant has complied with the requirements of the laws of the State' in reference to the matters enumerated.

"Whether the Commission has such 'satisfactory evidence' necessarily depends upon what the requirements of State law are. In turn, what the requirements of State law are often depends upon the appropriate but unsettled construction of State law. And so, the Commission may well be confronted, as it was in this case, with the necessity of determining what the State law requires before it can determine whether the applicant has satisfied it, and, therefore, whether the condition for exercising the Commission's power has been fulfilled.

"To safeguard the interests of the States thus protected by § 9(b), Congress has directed that notice be given to the State when an application has been filed for a license, the granting of which may especially affect a State. § 4(f), 49 Stat. 838, 841; 16 U.S.C. § 797(f). If a State does not challenge the claim of an applicant, the evidence submitted by the applicant, if found to be satisfactory by the Commission, has met the demands of § 9(b), and a State cannot thereafter challenge the Commission's determination. But a real

problem in administration is presented to the Power Commission when a State does intervene and claims that the applicant has not complied with its lawful requirements. For, before the Commission can meet the duty placed on it by § 9(b), it must ascertain the scope and meaning of the State law. Suppose the State law is not clear or is susceptible of different constructions and has received no construction by the only authoritative source for the interpretation of State laws, namely, the highest court of the State. Must the Federal Power Commission give an independent interpretation of the laws of the State? This is not to suggest an unreal or hypothetical situation. The Federal Power Commission submitted here a compilation of laws relating to State requirements relevant under § 9 (b) for not less than thirty States. Are the lawyers of the Commission to make themselves the originating 'interpreters of the laws of these States.' Are they to construe, for instance, the laws of New Jersey and Oklahoma and Arizona and Illinois when the courts of those States have not spoken? And if they do and the State appeals from the decision, must the Court of Appeals for the District of Columbia become the interpreter of these various laws? Finally, in the event of a further appellate review is this Court to construe State legislation without guidance by the State courts? Time out of mind, and in a variety of situations, this Court has admonished against the avoidable assumption by this Court of the independent construction of State legislation. See, e.g. *Gilchrist* v. *Interborough Co.*, 279 U. S. 159, 207-209; Brandeis, J., dissenting, in *Railroad Comm'n* v. *Los Angeles R. Co.*, 280 U. S. 145, 158, 164-66. It is pertinent to recall the classic statement of the reason for leaving to the controlling interpretation of local courts the meaning of local law: "In one brought up within it, varying emphasis, tacit assumptions, unwritten presence, a thousand influences

> gained only from life, may give to the different parts wholly new values that logic and grammar never could have got from the books.' *Diaz* v. *Gonzales*, 261 U. S. 102, 106. If it has been deemed unwise to throw upon this Court the burden of construing local legislation when the construction could by appropriate procedure be had from the States, it seems odd that we should reject this as a rule of administration adopted by the Power Commission."

It is to be noted that the majority of the Supreme Court did not think that § 9(b) required the Commission to wait until the state courts interpreted the meaning of state laws bearing on the question of the applicant's compliance therewith.

The majority opinion in the present case attempts to distinguish the three *Tacoma* cases cited in footnote 2 on the ground that the decision of the United States Supreme Court (357 U. S. 320, 2 L. Ed. (2d) 1345, 78 S. Ct. 1209) was based solely on the doctrine of *res judicata* regarding the decision of the court of appeals (267 F. (2d) 391). Generally speaking, that is true. But the Supreme Court actually went further and held that the Federal Power Commission's finding (No. 53), to the effect that the applicant (city of Tacoma) had submitted satisfactory evidence of compliance with all state laws insofar as necessary to effectuate the purposes of the project, was, after being approved by the court of appeals (and *certiorari* denied by the Supreme Court), binding on the parties involved. See 357 U. S., pp. 334-337.

In this case, the Federal Power Commission decided that it was not necessary to pass on the meaning or validity of RCW 35.84.030 because the city had power, under § 21 of the Federal Power Act (above quoted), to condemn the necessary properties of the P.U.D. The jurisdiction of the court of appeals has been invoked to review that decision.

As pointed out by the United States Supreme Court in the *Tacoma* case, *supra*, the court of appeals has *exclusive* jurisdiction to affirm, set aside, or modify, in whole or in part, orders of the Federal Power Commission. That court now has under consideration the question of the correctness and validity of the finding above quoted.

Until that court renders its decision or stays its hand pending the final decision of this court (if it so elects), no other court in the land, state or Federal, has jurisdiction of the issue presented to the trial court in this case.

In the interest of brevity, reference is made to the concurring opinion in the most recent *Tacoma* case (160 Wash. Dec. 64) at page 71 *et seq.*, and the authorities cited therein. It is recognized that in that case Initiative No. 25 was not enacted until many years after the Federal Power Commission had issued, and the city of Tacoma had accepted, a license for the project, while in this case the statute claimed to be prohibitory had been on the books for over twenty-five years prior thereto. However, the question of jurisdiction is settled by the *First Iowa* case and the *Tacoma* case referred to above.

Because the F.P.C. did not find it necessary to decide the question urged upon us by appellants and for the further reason that the court of appeals has exclusive jurisdiction of the controversy, it is my opinion that the trial court correctly held that it had no jurisdiction of the controversy, and its judgment dismissing the action should be affirmed.

DONWORTH, J.

I concur. HAMILTON, J.

The logic or reasoning of the dissent written by Judge Donworth is *in my opinion* unanswerable and it follows that remanding this matter for further proceedings in the trial court is a fruitless act; consequently I concur in the dissent.

FINLEY, C. J.

APPENDIX D

Opinion of the Supreme Court of Washington of October 2, 1962 (60 Wn. 2d 852, 375 P. 2d 256 (1962))

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 36486

EN BANC

ROBERT R. BEEZER, *Appellant*,

v.

THE CITY OF SEATTLE, GORDON S. CLINTON, as Mayor of said City, and M. B. MITCHELL, DAVID LEVINE, CHARLES M. CARROLL, CLARENCE F. MASSART, J. D. BRAMAN, MYRTLE S. EDWARDS, FLOYD C. MILLER, BOB JONES and PAUL J. ALEXANDER, as the duly constituted Council of the City of Seattle, *Respondents*,

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON, *Intervenor-Appellant*.

Filed Oct. 2, 1962

PER CURIAM.—This matter comes before us on a motion to dismiss the appeal in this case.

The appeal was argued before this court Thursday, June 14, 1962, and appears in our Advance Sheets of August 3, 1962 (Vol. 160 Wash. Dec. 241, 373 P. (2d) 796).

The city of Seattle filed a timely petition for rehearing, which stayed the going down of the remittitur until we disposed of the petition. While the petition was under consideration, the city of Seattle moved to dismiss the appeal on the basis of the opinion of the United States Court of Appeals for the District of Columbia Circuit, in cause No. 16,653, *Public Utility District No. 1 of Pend Oreille, Washington, Petitioner*, v. *Federal Power Commission, Respondent, the City of Seattle, Intervenor*, 308 F. (2d) 318, affirming an order of the commission.

It is the contention of the city that this decision of the circuit court is res judicata of the issues raised on this appeal and renders the appeal moot.

We are advised that Public Utility District No. 1 of Pend Oreille County will petition the Supreme Court of the United States to review, by certiorari, the circuit court's affirmance of the order of the Federal Power Commission; and, pending such review, we do not accept the conclusions of the circuit court as res judicata of the issues heretofore determined by this court in its opinion of August 3, 1962. Nor do the conclusions of the circuit court render moot the issues presented to us for determination, unless, and until, the judgment of the circuit court becomes final and binding on Public Utility District No. 1 of Pend Oreille County, Washington.

The motion to dismiss the appeal is denied.

DONWORTH, J. (dissenting)—The decision of the United States Court of Appeals for the District of Columbia, *Public Utility District No. 1 of Pend Oreille, Washington, Petitioner,* v. *Federal Power Commission, Respondent, The City of Seattle, Intervenor,* filed August 30, 1962, 308 F. (2d) 318, held that there was no need to decide the only question involved in the present case because the City of Seattle had authority under § 21 of the Federal Power Act, 16 U.S.C.A. § 814, to condemn the property of the public utility district.

The result of the above majority opinion is to remand the present case to the trial court for the trial of an issue of fact which is now immaterial. It could become material only if the United States Supreme Court should (a) grant the public utility district's proposed petition for certiorari and (b) subsequently reverse the decision of the Court of Appeals. None of the parties are seeking a stay of proceedings in this case until the United States Supreme Court disposes of that case.

For the reasons stated in the dissenting opinions in the instant case (*Beezer* v. *Seattle*, 160 Wash. Dec. 241, 373 P. (2d) 796), the remand of this case at this time is a useless act and will impose on the litigants unnecessary labor and expense.

Assuming that the pending petition for rehearing in this court will be denied, I would grant the city's motion to dismiss the appeal.

DONWORTH, J.

We concur in this dissent:

FINLEY, C. J.

HAMILTON, J.

APPENDIX E

Statutes Involved

Section 313(b), 16 U.S.C. § 825*l*(b), of the Federal Power Act provides as follows:

> "(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. . . . Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. . . . The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28."

Section 21 of the Federal Power Act, 16 U.S.C. § 814, provides as follows:

"When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the Commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such lands or other property may be located, or in the State courts. . . ."

Section 35.84.030 of the Revised Code of Washington provides:

"Every city or town owning its own electric power and light plant may exercise the power of eminent domain as provided by law for the condemnation of private property for any of the corporate uses or purposes of the city or town: *Provided*, that no city or town shall acquire, by purchase or condemnation, any publicly or privately owned electric power and light plant or electric system located in any other city or town except with approval of a majority of the qualified electors of the city or town in which the property to be acquired is situated; nor shall any city or town acquire by condemnation the electric power and light plant or electric system, or any part thereof, belonging to or owned or operated by any municipal corporation, mutual, nonprofit, or cooperative association or organization or by a public utility district."